COTTONWOOD HEIGHTS

RESOLUTION NO. 2011-44-D

A RESOLUTION DENYING A PETITION FOR DISCONNECTION BY COTTONWOOD ESTATES DEVELOPMENT, LLC

WHEREAS, on 4 August 2011, pursuant to UTAH CODE ANN. §10-2-501, Cottonwood Estates Development, LLC ("*Petitioner*") filed a petition (the "*Petition*") with the city of Cottonwood Heights (the "*City*") seeking to disconnect from the City the property described in exhibit "A" to the Petition (the "*Property*"); and

WHEREAS, on 29 August 2011, Petitioner notified the City of completion of the public noticing of the Petition required by UTAH CODE ANN. §10-2-501; and

WHEREAS, on 20 September 2011, pursuant UTAH CODE ANN. §10-2-505.5(1), a public hearing (the "*Hearing*") on the Petition was held before the City's legislative body (the "*Council*"); and

WHEREAS, pursuant to UTAH CODE ANN. §10-2-505.5(4), within 45 calendar days after the Hearing, the Council is required to determine whether to grant the Petition and, if the Council determines to grant the Petition, to adopt an ordinance approving the disconnection; and

WHEREAS, the Council met in regular session on 1 November 2011 to consider, among other things, whether to approve or to deny the Petition; and

WHEREAS, after careful consideration, the Council has determined that it is in the best interests of the health, safety and welfare of the City's residents to deny the Petition based, *inter alia*, on the findings, analysis and conclusions set forth in the "Decision" (the "*Decision*") that is attached as an exhibit to this resolution and is incorporated herein by this reference;

NOW, THEREFORE, BE IT RESOLVED by the city council of Cottonwood Heights that the Petition is hereby **DENIED** based, *inter alia*, on the findings, analysis and conclusions set forth in the attached Decision.

This Resolution, assigned no. 2011-44-D, shall take effect immediately upon passage.

PASSED AND APPROVED this 1st day of November 2011.

COTTONWOOD HEIGHTS CITY COUNCIL

By Gordon M. Thomas
Gordon M. Thomas, Mayor Pro Tempore

Linda W. Dunlavy, Recorder

VOTING:

Kelvyn H. Cullimore, Jr.	Yea ✓	Nay ___
Gordon M. Thomas	Yea ✓	Nay ___
J. Scott Bracken	Yea ✓	Nay ___
Michael J. Peterson	Yea ___	Nay ___
Tee W. Tyler	Yea ✓	Nay ___

DEPOSITED in the office of the City Recorder this 1st day of November 2011.

RECORDED this 2nd day of November 2011.

569026.1

DECISION
OF THE CITY COUNCIL OF
COTTONWOOD HEIGHTS, UTAH
ON PETITION FOR DISCONNECTION

PETITIONER: COTTONWOOD ESTATES DEVELOPMENT, LLC
Terry Diehl, Member and Manager
c/o Mark Garza
P.O. Box 711879
Salt Lake City, UT 84171

c/o Richard D. Burbidge
BURBIDGE MITCHELL & GROSS
215 South State Stree, Suite 920
Salt Lake City, UT 84111

c/o Bruce R. Baird
BRUCE R. BAIRD, PC
2150 South 1300 East, Suite 500
Salt Lake City, UT 84106

HEARING DATE: 20 September 2011

DECISION DATE: 1 November 2011

ON MOTION DULY MADE and seconded, the City Council (the "*Council*") of the city of Cottonwood Heights, Utah (the "*City*") hereby **DENIES** the disconnection petition (the "*Petition*") by Cottonwood Estates Development, LLC ("*Petitioner*") for the real property (the "*Property*") described in exhibit "A" to the Petition. Such decision, which is provided pursuant to UTAH CODE ANN. §10-2-502.5(4), is based on the Council's 20 September 2011 hearing on this issue, all comments and information provided at such hearing, and on the following findings and analysis.

PROCEDURAL BACKGROUND

On 4 August 2011, pursuant to UTAH CODE ANN. §10-2-501, Petitioner petitioned the City to disconnect the Property from the City. On 29 August 2011, Petitioner notified the City of the completion of the public noticing of the Petition required by UTAH CODE ANN. §10-2-501. A hearing on the petition (the "*Hearing*") was held before the Council on 20 September 2011 pursuant to UTAH CODE ANN. §10-2-502.5(1).

SUMMARY OF DECISION

The Property that Petitioner is asking the City to disconnect is an essential element of the "Resort Gateway Development" long considered by the City to be one of its most valuable

assets for future development. *See*, Cottonwood Heights General Plan (the "*General Plan*") at pp. 6-14. Disconnecting the Property would seriously impair that development by pitting Salt Lake County (the "*County*") against the City with competing "resort zones" that undermine the development of a single coordinated development area where hotels and related commercial and office uses are located near existing transit corridors *supported by* "resort-residential" uses in less accessible areas like the Property. To protect this critical asset, the City will vigorously oppose disconnection while simultaneously proceeding with the timely consideration and adoption of a new proposed Canyon Residential Development zone (the "*CRD zone*") for the Property that provides for higher density resort-residential uses to support the surrounding hotel-commercial uses.[1]

The CRD zone was presented in a public meeting of the City's Planning Commission (the "*Planning Commission*") on 19 October 2011, and now is proceeding through the statutory process required by the Municipal Land Use, Development, and Management Act, UTAH CODE ANN. 10-9a-101 *et seq.* ("*LUDMA*") before adoption can occur. The required public hearing before the Planning Commission is scheduled for 7 December 2011, and it is anticipated that the CRD zone will be on the Council's agenda for adoption within 1-2 months thereafter. The CRD zone incorporates many of the concepts proposed by Petitioner at the 28 June 2011 hearing on the so called Canyon Resort Residential Zone ("*CRR zone*"), but excludes the hotel and commercial uses that the Council determined are better suited for adjacent properties with superior access and visibility. Those differences aside, the City recognizes and appreciates Petitioner's valuable contributions towards the development of the Resort Gateway Development concept and looks forward to working with Petitioner to adopt and implement the CRD zone in a manner that will enhance and complement the overall success and viability of this critical development.

If, alternatively, Petitioner declines to participate in that process, the City will vigorously oppose disconnection on the ground that this statutory process is not appropriately used to sacrifice optimal public planning for the short term gain of a single property owner attempting to preemptively exploit commercial uses best suited for adjacent properties. Consequently, the Petition is denied.

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[1] The Council recognizes there may be some opposition to the adoption of a higher density CRD zone by those who contend that the existing plat of the Property (for 43 large lots) should not be changed. In that regard, the Council notes that the existing F-1-21 zoning of the Property would allow the existing plat of the property to be amended through an administrative process to increase the number of lots from the currently-platted 43 to as many as 92 lots. While the current F-1-21 zone also is consistent with the Resort Gateway Development concept described in the General Plan, the Council anticipates adopting the higher density CRD zone, and then re-zoning the Property to that zone, to encourage Petitioner to forego the risk, cost and divisiveness of a disconnection lawsuit. The Council rejects any resulting criticism that it is improperly "succumbing to intimidation," noting that (a) the key elements of the CRD zone follow the recommendations of the advisory citizens committee empanelled by the Council in early 2010 concerning development of the Property pursuant to the CRR zone, as then amended, and (b) the Council expressed its intention to consider approving more intensive residential use of the Property when it denied approval of an earlier version of the CRR zone on 2 August 2011. Petitioner has the statutory right to pursue disconnection, and the Council has the right and responsibility to respond to that threat in the manner that it determines is in the City's best interest.

STANDARD FOR DISCONNECTION

In ruling on the Petition, the following factors set forth in UTAH CODE ANN. §10-2-502.7(3) were considered and applied by the Council:

(3) The burden of proof is on petitioners who must prove, by a preponderance of the evidence:

(a) The viability of the disconnection;

(b) That justice and equity require that the territory be disconnected from the municipality;

(c) That the proposed disconnection will not:

(i) Leave the municipality with an area within its boundaries for which the cost, requirements, or other burdens of providing municipal services would materially increase over previous years;

(ii) Make it economically or practically unfeasible for the municipality to continue to function as a municipality; or

(iii) Leave or create one or more islands or peninsulas of unincorporated territory; and

(d) That the county in which the area proposed for disconnection is located is capable, in a cost-effective manner and without materially increasing the county's costs of providing municipal services, of providing to the area the services that the municipality will no longer provide to the area due to the disconnection.

VIABILITY OF THE DISCONNECTION

Petitioner has failed to meet its burden of demonstrating by a preponderance of the evidence that the proposed development (as described in the report of Wikstrom Economic & Planning Consultants, Inc. attached to the Petition, called herein the "*Wikstrom Report*") is politically or economically viable.

1. **Political Viability**. Petitioner argues that "disconnection from the City is the only equitable remedy which will allow for the *viable* development of the Property" because the Council denied approval of the CRR zone ordinance that would allow development of the Property in the "mixed use" manner that "Petitioner has every reason to believe Salt Lake County... would welcome." Petition at ¶¶ 2-3. Petitioner relies on the opinion of a former director of the County's Planning and Development Services department that "the County would have an interest in obtaining jurisdiction for this parcel." Statement of Jeffery Daugherty at ¶ 8.

That speculative opinion of a person who has not worked for the County for four years is insufficient to sustain the Petitioner's burden of proving that disconnection "will allow for the viable development of the Property" as proposed by Petitioner. In fact, letters received by the City from the County's mayor and seven of the nine current members of the Salt Lake County Council indicate that the proposed development plan would face serious opposition at the County. This is in sharp contrast to the situation existing in *Bluffdale Mountain Homes, LC. v. Bluffdale City*, 2007 UT 57, 167 P3d 1016 (the primary authority on which Petitioner relies),

where the petitioner sought to disconnect a parcel of land from the city of Bluffdale that was contiguous to a tract of land located in unincorporated Salt Lake County (and later included in the city of Herriman upon its incorporation) where the "County approved a general plan of development for the property" over Bluffdale's objections. Id. at ¶¶ 4-5.

2. **Economic Viability**. On 2 August 2011, when the Council voted not to adopt the proposed CRR zone (that potentially allowed for a hotel and other commercial development on the Property), the Council indicated a willingness to consider the development of a new zone that will include a "more diverse product mix" of "single family homes, condominiums" and other *residential* components of the CRR zone, but without the hotel and commercial components, and further indicated that the City would welcome Petitioner's participation in that legislative process which is now formally underway.

The Property is in close proximity to the approximately 10.9 acres site of the former Canyon Racquet Club (located near the Southwest corner of the intersection of Wasatch Blvd. and Big Cottonwood Canyon Road), which now is under development as a proposed mixed-use project to be known as the Canyon Centre (the "*Canyon Centre*"). The developer of the Canyon Centre has announced that at least one, and possibly two, new hotels will be constructed as part of the Canyon Centre. Those hotels will be located on high volume transportation corridors with open access and visibility superior to that available on the Property. This development was not considered in the Wikstrom Report. The Wikstrom Report also does not address the impact of the highly anticipated development of the "gravel pit/quarry area (located just west of the Tavaci Property) [that] is clearly designated as an area for future development as mixed use, tourist services" (Wikstrom Report at pp.12-13) on the viability of the Petitioner's proposed hotel and commercial uses.

The City believes that the viability of the entire Resort Gateway Development area (referred to in the General Plan as "a gateway to the City from Big Cottonwood Canyon") requires the placement of hotels and commercial uses in areas with optimal access and visibility, surrounded by higher density *residential* zones like the proposed CRD Zone that are designed to support, not dilute and interfere with, the adjacent commercial/mixed-use areas that are better suited for the hotel/commercial development that Petitioner desires to develop on the Property--an elevated bench area with limited access.

JUSTICE AND EQUITY

The "justice and equity' statutory requirement grants broad discretion to the decision maker in determining whether to allow a disconnection. *Bluffdale Mountain Homes. LC v. Bluffdale City,* 2007 UT at ¶¶ 59-60. The decision maker "may properly consider a wide range of factors favoring or disfavoring disconnection... Such extensive fact finding is contemplated under the statute's broad grant of discretion, and a review of [Utah] law confirms that the [Utah Supreme Court] has always considered a long list of relevant factors in disconnection disputes." *Id.*

1. **Development Status of the Property**. In *Bluffdale,* the Utah Supreme Court affirmed the district court's finding that "undeveloped land has historically been found to be appropriate for disconnection." *Id.* Unlike the raw ground at issue in *Bluffdale*, the Wikstrom Report concedes that here "a great deal of land planning was completed by property owners

proceeding (*sic*) [Petitioner] that led to the initial approvals in Salt Lake County." Wikstrom Report at p. 5. The Property was entitled for 61 lots (later amended to 52), and the access road was "relocated and redesigned at significant cost" to serve the anticipated needs of the entitled residential zone. *Id.* at p. 4. Further, Petitioner "expended approximately $30 million in placing the necessary infrastructure and making other improvements on the Subdivision." Petition at ¶ 15. The Property currently is improved with most or all necessary "horizontal development," including improved roadways; curb, gutter and sidewalk; trees and other landscaping; utility lines stubbed to the individual lots; etc. In addition, "vertical development" has occurred on the Property through construction of at least one model home/clubhouse. Thus, the Property is not undeveloped raw ground like the disconnection parcel in *Bluffdale*.

Significant time and resources were expended by Petitioner, Petitioner's predecessors in title, the County and other interested persons in the contentious and hard fought process leading up to the compromise land use planning decisions that resulted in the Property's entitlements in effect upon the City's incorporation in January 2005. Since then, City planners and property owners within and adjacent to the Property have made decisions and expended resources in reliance on the Property's entitlements and subsequent development. The City's future plans for, and the viability of, mixed use developments in the adjacent "gravel pit" property (the "*Gravel Pit*") and the nearby Canyon Centre project will be materially, adversely impacted if the Property and other portions of the bench area that were designated for residential uses are instead developed for the mixed use (including hotel and commercial) purposes that the General Plan designates for the Gravel Pit and surrounding, more accessible and commercially visible, areas. Similarly, approvals obtained for the Property's access road (from Big Cottonwood Canyon Road) (the "*Access Road*") were based on the entitled use of the Property for residential purposes, which will be materially altered if the more intensive hotel and commercial uses for the Property sought by Petitioner are gained through this disconnection proceeding.

The significant planning efforts, granting of entitlements and infrastructure development to the Property, and the substantial reliance by third parties and the City on those factors over the past 18 years since the Property was first zoned and entitled by the County in 1993, clearly distinguish this situation from the undeveloped raw ground at issue in the *Bluffdale* case.

2. **Zoning and Planning Process**. Another factor cited by the Utah Supreme Court in its decision to affirm the disconnection petition in *Bluffdale* is that "Bluffdale's zoning and planning process as applied to [petitioner] reflects unreasonable delay and arbitrary changing standards." 2007 UT at ¶ 31. In *Bluffdale*, however, the Bluffdale *City Council* unanimously approved a resolution declaring its intent to support the mixed use zoning sought by the developer, only to reverse itself a year later when that city council voted to reject the General Plan Amendment required to implement that zone. Here, however, Cottonwood Heights' *City Council* has not taken inconsistent positions concerning the Property in the zoning process. That the Council failed to approve a zone recommended by the City's Planning Commission is neither arbitrary nor unreasonable; under LUDMA, the Planning Commission is merely a recommending body, and the Council is the final decision maker with *the responsibility and authority* to review, modify, approve and/or reject recommendations of the Planning Commission.

The *Bluffdale* decision demonstrates why Petitioner's claim of "unreasonable delay" here is unfounded. There, the developer first approached the city to adopt a mixed use zone that was

similar to an existing development in the neighboring community of Herriman. 2007 UT at ¶ 6. Six years later, the Bluffdale city council rejected the mixed use proposal, then approved it during the disconnection lawsuit, which approval was then thwarted by two citizen referenda. Here, the city-initiated CRR zone was first discussed conceptually with City planning staff in approximately April 2009; was first introduced to the Planning Commission in approximately July 2009; and was recommended for approval by the Planning Commission in August 2009—an extremely accelerated response to a major land use planning proposal by anyone's standard.

Unlike the city council in *Bluffdale*, however, four of the five members of the Council had never seen the new CRR zone, nor had any discussions with the developer concerning it, nor been briefed by anyone concerning its details, until after the Planning Commission's recommendation was received. It was only in mid-August 2009 that all members of the Council were presented with the proposed CRR zone and had the opportunity to express their significant concerns. Over the following year, the City's elected officers and staff held numerous meetings with Petitioner and its consultants, and a number of public meetings, in an effort to appropriately flesh out and address those concerns and reach an acceptable middle-ground. Those efforts concerning the CRR zone continued until approximately October 2010, when Petitioner filed an application for a new zone for the Property. At that point, the City held the CRR zone in abeyance and focused its efforts on Petitioner's new zone application until earlier this year when, apparently abandoning its application for a new zone, Petitioner switched its focus back to the original CRR zone. In other words, the two years that elapsed between the Council's first look at the proposed CRR zone and the final vote to deny it were spent in a constructive effort to turn a controversial proposal that conflicted with the General Plan into a new zone that enhances and complements the Resort Gateway Development that Petitioner's own expert acknowledges is of fundamental importance to the City. Wikstrom Report at pp. 11-13.

3. **Current Political Climate**. In *Bluffdale*, the city council's efforts to adopt zoning for the property (nearly eight years after the petitioner first approached the city) were thwarted by a citizen referendum that attempted to block a Special Development Ordinance passed by the city council. 2007 UT at ¶ 19. When the Bluffdale city council attempted to avoid the delay of a referendum by approving a consent decree with the developer, Bluffdale citizens applied for a second referendum to overturn that approval. *Id.*

Here, although there has been vigorous public debate during the planning process, even Petitioner's counsel concedes that this debate has been beneficial to that process. The effort to formulate an acceptable zoning ordinance for this unique, visible piece of realty has not been derailed and has continued forward despite Petitioner's changing focus. In fact, within the next few months, following full compliance with LUDMA's requirements, the Council anticipates approving the new CRD zone that will implement many of the "resort residential" concepts proposed by Petitioner *before* a costly and disruptive disconnection lawsuit is likely to be resolved.

4. **Purpose of the Disconnection**. At the 20 September 2011 public hearing on the Petition, Petitioner's counsel ended his presentation with the remarkable statement that Petitioner is seeking disconnection because it would rather deal with the "devil it does not know [the County] than the devil it does [the City]." In other words, unlike the *Bluffdale* case where there was no question that disconnection would allow the petitioner to immediately benefit from

the existing zoning regimen in Herriman that Bluffdale failed to approve after six years of conflict, Petitioner has failed to offer any evidence that the zoning it wants is available in the County or that the County will approve and implement the zoning that Petitioner is demanding. In fact, seven of the nine sitting County councilmembers, and the County mayor, have publically opposed the disconnection. In the Council's view, it is neither just nor equitable to impose on the City's citizens and taxpayers the expense and disruption of disconnection where Petitioner cannot demonstrate that it is likely to obtain more favorable zoning from the County.

5. **Impact of the Disconnection on the City's Planning Process**. As Petitioner's expert acknowledges, "many of the goals/policies and action items of the City's General Plan relate directly to the future development of the Property." Wikstrom Report at p. 11. "The Gravel Pit /quarry area (located just west of [the Property]) is clearly designated as an area for future development as mixed–use, tourist-services." *Id.* Yet Petitioner is attempting to disconnect the Property from the City because the City refuses to approve intensive hotel and commercial uses that have never been allowed by any jurisdiction on any of the benches ringing the Salt Lake Valley and which the Council has determined are more appropriately suited for adjacent locations, below the bench, where access and commercial visibility are more conducive to such development. Through its Petition, Petitioner is attempting to circumvent the City's General Plan for a "mixed-use, tourist-services area" in the Gravel Pit by preemptively developing a hotel on bench property that is better suited for higher density residential uses that will complement and support the hotels and commercial uses planned for the more suitable areas in the Gravel Pit and the Canyon Centre. The use of the disconnection process to interfere with and undermine sound and orderly planning principles is not just or equitable.

6. **Exclusion of the Access Road from the Proposed Disconnection**. As described in the Petition, the Access Road to the Property faced significant opposition from environmental groups, requiring Petitioner to employ an unusual bridge design at a "significantly increased cost" to Petitioner. Petition at ¶¶ 8-13. Although the Access Road is currently private and is constructed on an easement across realty owned by Rocky Mountain Power, the Petition does not include the property on which the Access Road is constructed. This means that the burden of maintaining and repairing this unusual access structure ultimately may fall on the City even though the tax revenues from the Property would belong to the County if the disconnection is allowed. Petitioner's attempt to bifurcate jurisdiction over the Property from jurisdiction over the sole accessway to the Property appears designed to allow Petitioner to meet the statutory ownership requirement for filing the Petition without the need to obtain consent from other key owners such as Salt Lake County, Salt Lake City and Rocky Mountain Power. That inequitable scheme provides further justification for denial of the Petition.

IMPACT ON MUNICIPAL SERVICES, MUNICIPAL FUNCTION, COUNTY SERVICES AND THE CREATION OF ISLANDS OR PENINSULAS

At this point, the factors set forth in UTAH CODE ANN. §10-2-502.7(3)(c) and (d) are not at issue in the proposed disconnection.

CONCLUSION

Based on the foregoing reasons and pursuant to UTAH CODE ANN. §10-2-502.5(4), the Council denies the Petition. The City appreciates the positive contributions Petitioner has

provided during the planning process. Many of those proposals have been incorporated by the City into the new CRD zone that will enhance and improve the development of the Resort Gateway Development that is of critical importance to the City's future. Again, the City urges Petitioner to terminate this divisive and costly disconnection battle so that limited public and private resources can be devoted to the planning and development of a world-class Resort Gateway Development.

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